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The Individuals with Disabilities Education Act (IDEA) is a funding act[1] that dates back to 1975.[2] The primary purpose of the Act is to provide a "free appropriate public education" (FAPE) to each child with a disability.[3] The vehicle for determining and delivering FAPE is a team-based process, including parental participation, centered on an "individualized education program" (IEP).[4]

The cornerstone for resolving disputes between parents and districts

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1. The costs of special education average at least double that of regular education. *See, e.g.*, Jay G. Chambers et al., What Are We Spending on Special Education Services in the United States, 1999-2000? (2002), *available at* ERIC Document Reproduction Service, Access No. ED471888. Yet, Congress only provides approximately twenty percent of the difference. *See, e.g.*, MITCHELL YELL, THE LAW AND SPECIAL EDUCATION 112 (2006).

2. 20 U.S.C. §§ 1400 *et seq.* (2003). Its original name was the Education for All Handicapped Children's Act. *Id.* § 1400(c)(2). Congress reauthorized the Act several times, with successive refinements. The 1986 reauthorization imported the attorneys' fees feature of civil rights legislation, such as Section 504 of the Rehabilitation Act of 1973 and the Americans with Disabilities Act of 1990. The 1990 reauthorization included the name change to the IDEA. The most recent reauthorization, signed by President George W. Bush on December 3, 2004, went into effect, in relevant part, on July 1, 2005. The implementing regulations for the IDEA are at 34 C.F.R. pt. 300; those pursuant to the most recent reauthorization are currently in proposal stage. 70 Fed. Reg. 35,782 *et seq.* (proposed June 21, 2005) (to be codified at 34 C.F.R. pt. 300).

3. *See, e.g.*, 20 U.S.C. § 1400(d)(1)(A) (2003). FAPE consists of special education and related services designed to address the needs of the individual eligible child. *Id.* § 1401(8); *see also* 34 C.F.R. § 300.13 (2004).

4. 20 U.S.C. §§ 1401(9) and 1414(d) (2003); *see also* 34 C.F.R. §§ 300.16 and 300.347 (2004).

as to eligibility, FAPE, and other issues under the IDEA is an impartial administrative adjudication.[5] The IDEA gives states the choice of having a one-tiered system, consisting solely of an impartial due process hearing, or a two-tiered system, which includes an additional review officer level.[6] Subsequent to exhausting this administrative adjudication, the aggrieved party has the right to judicial review in state or federal court.[7] During the pendency of these administrative and judicial proceedings, the Act's so-called "stay-put" provision dictates that the child remain in his or her current placement, i.e., the placement where the child was when the parent originally filed for a due process hearing.[8] Finally, the Act not only accords judges the authority to award attorneys' fees in specified circumstances,[9] but also, without further specification, requires them to grant "such relief as the court determines is appropriate."[10] However, the Act and its accompanying regulations[11] are largely silent about the remedial authority of the impartial hearing/review officers.[12]

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5. 20 U.S.C. § 1415(b)(6) (2003); *see also* 34 C.F.R. § 300.507(a) (2004). The other dispute resolution mechanism, which is purely administrative and without judicial review, is the state complaint resolution process. 34 C.F.R. §§ 300.660-300.662. On the other hand, mediation is an adjunct to the hearing/review process. *Id.* § 300.506.

6. 20 U.S.C. § 1415(f)-(g) (2003); *see also* 34 C.F.R. §§ 300.510 and 300.512 (2004). Currently, approximately seventeen states have a second, review-officer tier, with the remaining thirty-four states opting for a one-tier, state-level hearing officer system. Eileen Ahearn, *Due Process Hearings: 2001 Update*, QTA: PROJECT FORUM 2 (April 2002), http://www.nasdse.org/publications.cfm.

7. 20 U.S.C. § 1415(i)(2) (2003); *see also* 34 C.F.R. § 300.512(a) (2004). The resulting concurrent jurisdiction can cause problematic differences. See *infra* note 19.

8. 20 U.S.C. § 1415(j) (2003); *see also* 34 C.F.R. § 300.514 (2004).

9. 20 U.S.C. § 1415(i)(3) (2003); *see also* 34 C.F.R. § 300.513 (2004).

10. 20 U.S.C. § 1415(i)(2)(C)(iii) (2003); *see also* 34 C.F.R. § 300.512(b)(3) (2004).

11. In contrast, the regulations accord the state complaint process, which is the alternate administrative dispute resolution mechanism, express remedies, including expense reimbursement and compensatory education. 34 C.F.R. §§ 300.660(b)(1) and 300.662(c) (2004).

12. There are limited exceptions. The first is an injunction, analogous to the judicial authority construed in Honig v. Doe, 484 U.S. 305 (1988), to change the placement of the child on an interim basis in narrowly specified, danger-based disciplinary circumstances. 20 U.S.C. § 1415(k)(2) (2003). Based on additional language in the regulations in terms of the district proposing the interim placement, the hearing officer's determination is arguably only declaratory, rather than injunctive, relief. 34 C.F.R. § 300.521(d) (2004). A second limited exception is the declaratory or injunctive authority, unless inconsistent with state law, to override a refusal of parental consent to an initial evaluation or re-evaluation. 20 U.S.C. § 1414(a)(1)(C)(ii); 34 C.F.R. § 300.505(b). Conversely, however, the 2004 IDEA reauthorization codified the administering agency's interpretation that hearing officers lack such overriding authority for parental refusals of consent for initial services. 20 U.S.C. § 1414(a)(1)(D)(ii) (2004); *see also* Letter to Manasevit, 41 IDELR ¶ 36 (OSEP 2003); Letter to Gagliardi, 36 IDELR ¶ 267 (OSEP 2001); Letter to Cox, 36 IDELR ¶ 66 (OSEP 2001). Third, the IDEA specifically grants hearing officers, not only judges, the authority to issue tuition reimbursement; however,

In thirty years of litigation under the IDEA,[13] which has continued to expand counter to the overall trend in education litigation,[14] courts have administered various traditional forms of relief, primarily in the form of the injunction-based, specialized equitable remedies of tuition reimbursement[15] and compensatory education.[16] The courts have also provided derivative authority to hearing/review officers, along with increasingly demarcated boundaries and standards, for these two remedies.[17]

The Third Circuit and the Pennsylvania courts have been leaders in filling in the wide gap in the IDEA as to appropriate remedies.[18] However, on occasion, these two court systems, which have concurrent jurisdiction under the IDEA, have arrived at conflicting answers relating

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in odd partial contradiction it limits the equitable step to "a *judicial* finding of unreasonableness." *See* 20 U.S.C. § 1412(a)(10)(C)(ii) (emphasis added); *see also* 34 C.F.R. §§ 300.403(c) and 300.403(d)(3). Finally, in limiting the hearing officer's authority to find a denial of FAPE on circumscribed, basically prejudicial procedural violations, the 2004 IDEA reauthorization expressly recognized a hearing officer's authority to order a district to comply with the Act's pertinent procedural requirements. 20 U.S.C. § 1415(f)(3)(E)(ii)-(iii). More specifically, the prescribed prejudicial procedural violations are limited to those that impeded or denied a child's right to FAPE and those that "significantly impeded the parents' opportunity to participate in the decisionmaking process regarding the provision of [FAPE]." *Id.*

13. *See, e.g.*, Perry Zirkel & Anastasia D'Angelo, *Special Education Case Law: An Empirical Trends Analysis*, 161 EDUC. L. REP. (West) 731 (2002).

14. *See, e.g.*, Perry Zirkel, *The "Explosion" in Education Litigation: An Update*, 114 EDUC. L. REP. (West) 341, 346-49 (1997).

15. *See, e.g.*, Thomas Mayes & Perry Zirkel, *Special Education Tuition Reimbursement Claims: An Empirical Analysis*, 22 REMEDIAL & SPECIAL EDUC. 350 (2001).

16. *See, e.g.*, Perry Zirkel, *Compensatory Education Services under the IDEA: An Annotated Update*, 190 EDUC. L. REP. (West) 745 (2004).

17. *See, e.g.*, Perry Zirkel, *The Remedial Authority of Hearing/Review Officers under the Individuals with Disabilities Education Act*, 58 ADMIN. L. REV. __ (forthcoming June 2006). In contrast, the courts agree that hearing/review officers have no authority to grant money damages under the IDEA. *Id.*

18. *Id.* The Third Circuit has also played a leading position in other IDEA issues, such as extended school year, Battle v. Commonwealth, 629 F.2d 269 (3d Cir. 1980); inclusion, Oberti v. Bd. of Educ., 995 F.2d 1204 (3d Cir. 1993); FAPE, Fuhrmann v. E. Hanover Bd. of Educ., 993 F.2d 1031 (3d Cir. 1993); Polk v. Cent. Susquehanna Intermediate Unit 16, 853 F.2d 171 (3d Cir. 1988); Bd. of Educ. v. Diamond, 808 F.2d 987 (3d Cir. 1986); independent educational evaluations, Holmes v. Millcreek Twp. Sch. Dist., 205 F.3d 583 (3d Cir. 2000); Warren G. v. Cumberland County Sch. Dist., 190 F.3d 80 (3d Cir. 1999); attorney's fees, John T. v. Commonwealth, 318 F.3d 545 (3d Cir. 2003); Woodside v. Sch. Dist., 248 F.3d 129 (3d Cir. 2001); "stay-put" provision, Susquenita Sch. Dist. v. Raelee S., 96 F.3d 78 (3d Cir. 1996); Drinker v. Colonial Sch. Dist., 78 F.3d 859 (3d Cir. 1996); DeLeon v. Susquehanna Cmty. Sch. Dist., 747 F.2d 149 (3d Cir. 1984); and early intervention, Pardini v. Allegheny Intermediate Unit, 420 F.3d 181 (3d Cir. 2005); Bucks County Dep't of MH/MR v. Pennsylvania, 379 F.3d 61 (3d Cir. 2004).

to remedies under the IDEA.[19]

The purpose of this Article is to describe, evaluate, and propose revisions for the Third Circuit's approach to remedies under the IDEA, with primary attention to compensatory education. The first part of the Article summarizes the United States Supreme Court's two foundational decisions, which established the availability of and criteria for the remedy of tuition reimbursement under the IDEA. The second part of the Article addresses the Third Circuit's IDEA interpretations with regard to IDEA remedies, particularly compensatory education. The third part of the Article traces the relevant Congressional provisions in the successive reauthorizations of the IDEA, which focus on tuition reimbursement. Finally, the fourth part of the Article illustrates the confusion in the Third Circuit's approach and suggests a more coherent and consistent approach for compensatory education, which is informed by the Congressional and judicial development of tuition reimbursement.

I. Supreme Court: The *Burlington-Carter* Foundation

Aside from general declaratory and injunctive relief, the major remedy available to hearing/review officers and courts under the IDEA has been tuition reimbursement.[20] A pair of United States Supreme Court decisions established the availability of and boundaries for tuition reimbursement in IDEA cases. In its 1985 decision in *Burlington School Committee v. Department of Education*,[21] the Court held that the Act's broad discretionary grant of appropriate relief includes tuition reimbursement where the district's proposed IEP "calling for placement in a public school" is determined to be inappropriate and the parent's unilateral placement is determined to be appropriate.[22] Based upon the Court's concluding comment endorsing the lower court's balancing of the equities, without ruling on specific equitable factors considered,[23] most commentators and lower courts have read *Burlington* as

19. The prime illustration is the limitations period applicable to compensatory education under the IDEA. *See, e.g.*, Perry Zirkel, *The Statute of Limitations under the Individuals with Disabilities Education Act: Is* Montour *Myopic?* 12 WIDENER L.J. 1 (2003). The conflicting interpretations of the federal and state courts have led to costly gamesmanship. *See, e.g.*, Robert R. v. Marple Newtown Sch. Dist., 44 IDELR ¶ 186 (Pa. SEA 2005).

20. *See* Zirkel, *supra* note 17.

21. 471 U.S. 359 (1985).

22. *Id.* at 369-70. Interpreting the broad statutory grant of remedial authority, the Court reasoned that "the only possible interpretation is that the relief is to be 'appropriate' in light of the purpose of the Act . . . [which] is principally to provide handicapped children with a [FAPE]." *Id.* at 369.

23. *Id.* at 374. "We do think that the [lower] court was correct in concluding that [the IDEA provision for] 'such relief as the court determines is appropriate' . . . means that equitable considerations are relevant in fashioning relief." *Id.*

establishing a three-part test for tuition reimbursement: 1) is the district's proposed IEP appropriate, 2) if not, is the parent's unilateral placement appropriate, and 3) if so, do the equities favor reducing or denying reimbursement?[24] The Court reached its conclusion by finding that the Act's overriding purpose of providing the eligible child with FAPE trumps the stay-put provision and, in light of the Act's "ponderous" review process, warrants such a remedy.[25] The Court also reasoned that tuition reimbursement balances cost considerations because the parent is making such a unilateral placement "at their own financial risk,"[26] whereas "[r]eimbursement merely requires the [district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance had it developed a proper IEP."[27]

In its 1993 decision in *Florence County School District Four v. Carter*,[28] the Court held that when analyzing step two of this three-part test, the requirements for determining the appropriateness of the parent's unilateral placement are not as stringent as those that apply to the district's proposed placement in step one. More specifically, the Court ruled that neither the IDEA's IEP prescriptions, nor its related state standards, applied to the parent's unilateral placement. In its opinion, the Court also clarified that tuition reimbursement comes under the "IDEA's grant of equitable authority,"[29] and that the equitable considerations in step three of the test include the reasonableness of the cost of the parent's placement.[30]

II. Third Circuit: IDEA Remedies

A. Third Circuit: Tuition Reimbursement and Compensatory Education

After *Burlington*, the Third Circuit developed its initial analytical framework for tuition reimbursement and compensatory education. In the first pertinent decision, the Third Circuit followed the Eighth Circuit's view that, analogous to tuition reimbursement, compensatory

24. *See, e.g.*, Mayes and Zirkel, *supra* note 15. The IDEA's subsequent codification confirms this three-part framework, including the role of the equities. 20 U.S.C. § 1412(a)(10)(C) (2003); *see also* 34 C.F.R. § 403(c)-(e) (2004).

25. 471 U.S. at 370.

26. *Id.* at 374. It premised this choice on the parent having adequate financial means and being reasonably confident of the eventual adjudicative outcome. *Id.* at 370.

27. *Id.* at 370-71. In expressing this conclusion, the Court explicitly rejected the district's characterization of this remedy as constituting money damages. *Id.* at 370.

28. 510 U.S. 7 (1993).

29. *Id.* at 12.

30. *Id.* at 16.

education was within courts' equitable authority under the IDEA as a remedy for denials of FAPE.[31] More specifically, the Third Circuit characterized the Eighth Circuit as extending the *Burlington* rationale to compensatory education by "reasoning that compensatory education, *like tuition reimbursement*, cures the deprivation of a handicapped child's statutory rights."[32] Borrowing the Eighth Circuit's rationale that Congress did not intend a disabled child's entitlement to FAPE to depend upon the parent's ability and choice to "front" the costs of the education, the court concluded that "Congress, by allowing the courts to fashion an appropriate remedy to cure the deprivation of a child's right to . . . [FAPE], did not intend to offer a remedy only to those parents able to afford an alternative private education."[33] In dicta,[34] the court identified the following issues, set forth in the opinion, that it would revisit with definitiveness in later decisions: 1) whether, as the court suggested, hearing/review officers lacked authority to grant compensatory education,[35] and 2) whether the district's good faith efforts to provide FAPE entered into the calculus of awarding a remedy of compensatory

31. Lester H. v. Gilhool, 916 F.2d 865, 872-73 (3d Cir. 1990) (citing Miener v. State of Missouri, 800 F.2d 749 (8th Cir. 1986) (Miener II)). Even before *Burlington*, the Eighth Circuit concluded that compensatory education is "practically indistinguishable from a request for [tuition] reimbursement." Miener v. State of Missouri, 673 F.2d 969, 982 (8th Cir. 1982) (Miener I). For other circuits' recognition of the analogy based on *Burlington*, *see* Hall v. Knott County Bd. of Educ., 941 F.2d 402, 407 (6th Cir. 1991); Pihl v. Massachusetts Dep't of Educ., 9 F.3d 184, 189 (1st Cir. 1993); Burr v. Ambach, 863 F.2d 1071, 1078 (2d Cir. 1988); Jefferson County Bd. of Educ. v. Breen, 853 F.2d 853. 857-68 (11th Cir. 1988). Lower courts have also recognized the analogy, deriving compensatory education from tuition reimbursement. *See, e.g.*, White v. State, 240 Cal. Rptr. 732, 742 (Ct. App. 1987).

32. 916 F.2d at 873 (emphasis added).

33. *Id.* at 873.

34. Additionally, whether dicta or not, the court's ruling in this case may be misinterpreted that the implementation of compensatory education is limited to the period beyond age 21. In this particular case the Third Circuit upheld the district court's preliminary injunction, without exhaustion of the IDEA's administrative remedies, that the child, who was age 21 and had profound retardation, was entitled to thirty months of compensatory education beyond the statutory ceiling of age 21. The period of implementation is traceable in this case to the parent's particular request. *Id.* at 868. Although this issue is still subject to some judicial confusion, the majority and clearly better view is that implementation need (and should) not be delayed, but that age 21 is not a barrier just as long as the denial of FAPE occurred, as *Lester H.* reasoned, before age 21. *Id.* at 872. *See, e.g.*, Zirkel, *supra* note 16, at 748 nn.15-16. Being prospective, it should be in addition to whatever the child receives under the current, appropriate IEP; in most cases, there is ample implementation time after school, during weekends, and during vacation breaks without waiting for the child to pass through a bona fide graduation or the statutory age range.

35. 916 F.2d at 870. The modern view is quite the opposite. *See, e.g.*, Zirkel, *supra* note 16, at 747 n.11 (citing various lower court decisions and OSEP policy letters); Zirkel, *supra* note 17.

education.[36]

Next, in a 2-to-1 decision in *Bernardsville Board of Education v. J.H.*,[37] the Third Circuit formulated an equitable limitations period for filing for a due process hearing for the remedy of tuition reimbursement, specifically ruling that "more than one year, without mitigating excuse, is an unreasonable delay."[38] The court reached this conclusion by reasoning that such a limitation on the filing period provides the district with clear notice of the parent's intent, so that the district has a "practical opportunity"[39] to rectify the matter via a proposed revision to the IEP. Thus, while recognizing that the district has the obligation to provide FAPE, the court concluded that "the right of review contains a corresponding parental duty to unequivocally place in issue the appropriateness of an IEP."[40] Although equitably appropriate in terms of relief, this analysis poses a problem in terms of the applicable statute of limitations period: unlike IDEA case law generally, the Third Circuit does not use the borrowing analysis that is typically used in determining the statute of limitations for federal laws that do not specify a limitations period.[41]

The following year, the Third Circuit ruled that compensatory education required a denial of FAPE, but not that the denial be motivated by bad faith.[42] This conclusion is consonant with tuition reimbursement analysis: at step one, the requirement for reimbursement is a denial of FAPE, regardless of culpability.

The problem of conflicting and contradictory treatment of the two

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36. 916 F.2d at 873 n.12. For the Third Circuit's subsequent resolution of this issue, *see infra* note 42 and accompanying text.

37. 42 F.3d 149 (3d Cir. 1994). Judge McKee dissented in relevant part, rejecting a reciprocal duty on the parent and arguing instead for a totality test, which included notice to the district as only one of three stated factors. *Id.* at 162-64.

38. *Id.* at 158. Without further specification, the court explained the exception as "a consideration of mitigating circumstances for any delay in the initiation of review proceedings which might otherwise be deemed unreasonable." *Id.* at 158 n.14.

39. The court explained that the filing of a prompt complaint presents the alternative of obviating the possibly excess expenditures of a private placement. *Id.* at 157.

40. *Id.* Noting that "a balancing of the equities is unavoidable" under the broad framework of the Act, the court further explained its rights-duty analysis by reasoning that the district and the parent have a common interest on behalf of the child's right to FAPE, create mutual duties: "on the district to develop and justify its IEP, and on the parents to unambiguously challenge the IEP when they think it is appropriate." *Id.* at 158 n.14.

41. *See, e.g.*, Perry Zirkel & Peter Maher, *The Statute of Limitations under the Individuals with Disabilities Education Act*, 175 EDUC. L. REP. (West) 1, 2 (2003).

42. Carlisle Area Sch. Dist. v. Scott P., 62 F.3d 520 (3d Cir. 1995). The court disagreed with the Second Circuit's view that required more culpable conduct, such as a gross denial of FAPE. *Id.* at 537 (citing, *e.g.*, Garro v. State of Connecticut, 23 F.3d 734 (2d Cir. 1994)). The court also ruled that the burden of proof at step two rests on the parent. *Id.* at 533.

remedies arose in the Third Circuit's 1996 decision in *M.C. v. Central Regional School District*,[43] specifically in the court's accrual analysis, which was part of an otherwise equitable "flesh[ing] out"[44] of the standard for compensatory education. In the problematic part of the opinion, the Third Circuit ruled that "the right to compensatory education . . . accrue[s] from the point that the school district knows or should know of the IEP's failure."[45] Moreover, the Third Circuit noted two limitations on the right to compensatory education: an exception for de minimis denials of FAPE, and a deduction for a reasonable rectification period. Thus, balancing what initially appear to be *Bernardsville*-type interests[46] of the child in receiving FAPE, and of the district in avoiding excess costs, the court held as follows:

> A school district that knows or should know that a child has an inappropriate IEP or is not receiving more than a de minimis educational benefit must correct the situation. If it fails to do so, a disabled child is entitled to compensatory education for a period equal to the period of deprivation, but excluding the time reasonably required for the school district to rectify the problem.[47]

The Third Circuit's divergence in *M.C.* from its majority decision in *Bernardsville* is evident in the court's reasoning in *M.C.* that although actual knowledge or bad faith serve to strengthen the parent's case, "a child's entitlement to special education should not depend upon the vigilance of the parents (who may not be sufficiently sophisticated to comprehend the problem)."[48] The court failed to mention, much less attempt to distinguish or harmonize, its limitations period approach for tuition reimbursement with its accrual analysis for compensatory education.[49]

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43. 81 F.3d 389 (3d Cir. 1996).

44. *Id.* at 396.

45. *Id.* at 396-97.

46. *See supra* notes 39-40.

47. 81 F.3d at 397.

48. *Id.* The parenthetical qualified assumption compounds the problem. What if the parents are, as is often the case in tuition reimbursement litigation due to the associated fiscal means and legal assessment (*see supra* note 26), sufficiently sophisticated? For a specific example, *see infra* notes 92-94 and accompanying text. Moreover, such lack of vigilance, which equates to passive conduct, does not eliminate the equitable consideration of active bad faith, exemplified by obstructionist conduct.

49. The accrual analysis poses three other problems in relation to IDEA case law generally. First, as with *Bernardsville*, the court ignored the applicable borrowing analysis. *See supra* note 41 and accompanying text. Second, most courts pinpoint accrual in terms of when the parent, not the district, had constructive or actual knowledge of the alleged violation. Third, for stage one (i.e., due process hearing, as contrasted with stage two, being judicial review), these same courts generally distinguish accrual, which is the date period begins to run, from the statute of limitations, or length of this period.

The unjustified distinction continued in *Ridgewood Board of Education v. N.E.*,[50] where the court applied *M.C.* to 1) confirm that "failure to object to [the child's] placement does not deprive him of the right to an appropriate education [here in the form of compensatory education relief],"[51] and 2) remand the case for the lower court to determine whether the district failed to provide the child with FAPE for each of the disputed previous eight years and when the district had constructive or actual knowledge of the denial.[52] Furthermore, the court seemed to confirm that its accrual approach was equivalent to a limitations period for compensatory education at the due process hearing stage by separately determining the limitations period for the subsequent, judicial stage and, in contrast, using "accrual" as the starting point of the period for compensatory education at this initial stage.[53]

In the same year as *Ridgewood*, the Third Circuit issued another decision that compounded the confusion over the requirements for tuition reimbursement when it made the following interpretations with regard to tuition reimbursement: 1) it relied on *Bernardsville* for the stage one (i.e., due process hearing)[54] limitations period,[55] 2) it construed *Bernardsville* as providing an immediate limitations period with a one-year exception for mitigating circumstances,[56] and 3) it refused to allow unreasonable parental conduct to enter into step three of the equitable

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See, e.g., R.R. v. Fairfax County Sch. Bd., 338 F.3d 325 (4th Cir. 2003); James v. Upper Arlington City Sch. Dist., 228 F.3d 764 (6th Cir. 2000); Dreher v. Amphitheater Unified Sch. Dist., 22 F.3d 228 (9th Cir. 1994); Mandy S. v. Fulton County Sch. Dist., 31 IDELR ¶ 79 (N.D. Ga. 1999); *cf.* Murphy v. Timberlane Reg'l Sch. Dist., 22 F.3d 1186 (1st Cir. 1993) (compounded with continuing-violation and laches theories).

50. 172 F.3d 238 (3d Cir. 1999).

51. *Id.* at 250 (citing *M.C.* "vigilance" reasoning).

52. *Id.* at 251.

53. *Id.* The resulting open-ended limitations period for compensatory education at stage one and the differential treatment for tuition reimbursement are out-of-step with all of the other judicial interpretations of the applicable limitations periods. *See* Zirkel & Maher, *supra* note 41, at 6-7. Further, keying the accrual of the limitations period exclusively to the district's actual or constructive knowledge is contrary not only to the IDEA 2004 amendment's triggering of the limitations period to "the date the *parent or* district knew or should have known," but also, less directly, to the Supreme Court's recent ruling that the burden of proof in cases concerning the appropriateness of an IEP is on the challenging party, which almost always is the parent. 20 U.S.C.A. § 1415(f)(3)(C) (2005) (emphasis supplied); Shaffer v. Weast, 126 S. Ct. 508 (2005).

54. Not to be confused with the three-step test for tuition reimbursement, the IDEA's adjudicative dispute resolution system gives rise to two stages of a statute of limitations—one for the due process hearing and the other for subsequent judicial review. *See, e.g.*, Zirkel & Maher, *supra* note 41, at 34.

55. Warren G. v. Cumberland County Sch. Dist., 190 F.3d 80, 83 (3d Cir. 1999).

56. *Id.* at 84. "*Bernardsville* does not establish a one-year grace period as plaintiffs argue. In *Bernardsville*, parents who waited over two years to initiate proceedings were denied reimbursement for the entire two-year period and were not simply excused for their first year of inaction." *Id.*

analysis.[57] Furthermore, the court recognized that the 1997 IDEA amendments expressly contradicted its approach to unreasonable parental misconduct, but pointed out that this case arose prior to the effective date of the 1997 amendments.[58]

B. Third Circuit: Money Damages

Although the focus here is on compensatory education with regard to the Third Circuit's failure to follow the analogy of tuition reimbursement, the Third Circuit's approach to compensatory damages further reflects its lack of cogency and consistency in its provision of remedies for students with disabilities. In *W.B. v. Matula*,[59] the Third Circuit held that money damages were available to students bringing § 1983 claims to enforce the IDEA[60] and § 504.[61] The problem with the court's allowing money damages with respect to § 504 is that the court, in its cursory analysis, followed the Eighth Circuit's lead with regard to the availability of money damages[62] without addressing, much less adopting, the Eighth Circuit's limiting standard—that generally prevails elsewhere[63]—of bad faith or gross misjudgment.[64] Similarly, with respect to the IDEA, the court relied in notable part on its own case law,[65] whereas more careful analysis reveals that the clear majority[66]—

57. *Id.* at 85-86. The court appeared to allow for a possible exception where the parent's conduct obstructed the district from presenting an appropriate IEP. *Id.* at 86.

58. *Id.* at 86 n.3 (citing 20 U.S.C. § 1412(a)(10)(C)(iii)(III) (2003), which expressly allows judicial reduction or denial of tuition reimbursement upon a finding of unreasonable parental conduct).

59. 67 F.3d 484 (3d Cir. 1995).

60. However, the court advised: "We caution that in fashioning a remedy for an IDEA violation, a district court may wish to order educational services, such as compensatory education . . . or reimbursement for . . . private expense . . ., rather than compensatory damages for generalized pain and suffering." *Id.* at 495.

61. *Id.* at 494-95. The court also held that money damages were available directly under § 504. *Id.* at 494.

62. *Id.* at 494 (citing Rodgers v. Magnet Cove Pub. Sch., 34 F.3d 642, 645 (8th Cir. 1994) and Lue v. Moore, 43 F.3d 1203, 1205 (8th Cir. 1994)).

63. *See, e.g.*, M.P. v. Indep. Sch. Dist. No. 721, 326 F.3d 975, 982 (8th Cir. 2003); Smith v. Special Sch. Dist. No. 1, 184 F.3d 764, 769 (8th Cir. 1999). As these more recent cases confirmed, this standard dates back in the Eighth Circuit to a decision in the early 1980s. Monahan v. State of Nebraska, 687 F.2d 1164, 1171 (8th Cir. 1982).

64. *See, e.g.*, M.P. v. Indep. Sch. Dist. No. 721, 326 F.3d 975 (8th Cir. 2003); Smith v. Special Sch. Dist. No. 1, 184 F.3d 764 (8th Cir. 1999); Sellers v. Sch. Bd., 141 F.3d 524 (4th Cir. 1998), *cert. denied*, 119 S. Ct. 168 (1999); Wenger v. Canastota Cent. Sch. Dist., 979 F. Supp. 147 (N.D.N.Y. 1997), *aff'd mem.*, 181 F.3d 84 (2d Cir. 1999); Gabel v. Bd. of Educ., 368 F. Supp. 2d 313 (S.D.N.Y. 2005); Butler v. South Glens Falls Cent. Sch. Dist., 106 F. Supp. 2d 414 (N.D.N.Y. 2000); *cf.* Swenson v. Lincoln County Sch. Dist. No. 2, 260 F. Supp. 2d 1136 (D. Wyo. 2003); Smith v. Maine Sch. Admin. Dist. No. 6, 34 IDELR ¶ 201 (D. Me. 2001) (deliberate indifference).

65. 67 F.3d at 495. Even among the cases cited in *W.B.*, only one was specific to

and better view[67]—with or without the addition of § 1983, is in the opposite direction. Although again failing to specify a limiting standard for such relief, the court at least warned that "in fashioning a remedy for an IDEA violation, a district court may wish to order . . . compensatory education . . . or [tuition] reimbursement . . . rather than compensatory damages for generalized pain and suffering."[68] The court's confusion—occasioned by the incantation of § 1983—of the IDEA with civil rights acts, such as § 504, is further evident in its imposition of a heightened standard for the enforceability of settlement agreements under IDEA.[69]

III. Congress: Successive IDEA Amendments

The original version of the IDEA, which was the Education of the Handicapped Children's Act of 1975, cryptically clothed courts with the authority to grant "appropriate relief."[70] The successive reauthorizations

money damages as contrasted with other forms of relief. The court also relied on and overstated its previous ruling in *Board of Education v. Diamond*, 808 F.2d 987 (3d Cir. 1986). Rather than holding in *Diamond* that compensatory damages are available to enforce IDEA violations, as the *W.B.* court maintained, the *Diamond* court held "no more at this [preliminary] stage" than "we cannot say that [the plaintiffs] could not prove a set of facts upon which compensatory damage relief could not be granted for violation of the Constitution or the laws of the United States." 808 F.2d at 996. *Diamond* did not make clear whether the § 1983 claim for such relief was predicated on the IDEA, as contrasted with § 504 or the Fourteenth Amendment, and even if so, what the standard would be for said relief.

66. *Compare* Ortega v. Bibb County Sch. Dist., 397 F.3d 1321 (11th Cir. 2005); Nieves-Marquez v. Commonwealth of Puerto Rico, 40 IDELR ¶ 90 (1st Cir. 2003); Polera v. Bd. of Educ., 288 F.3d 478 (2d Cir. 2002); Padilla v. Sch. Dist. No. 1, 233 F.3d 1268 (10th Cir. 2000); Thompson v. Bd. of Educ. 144 F.3d 574 (8th Cir. 1998); Sellers v. Sch. Bd., 141 F.3d 524 (4th Cir. 1998); Charlie F. v. Bd. of Educ., 98 F.3d 989 (7th Cir. 1996); Crocker v. Tennessee Secondary Sch. Athletic Ass'n, 980 F.2d 382 (6th Cir. 1992), *with* Goleta Union Elementary Sch. Dist. v. Ordway, 248 F. Supp. 2d 936 (C.D. Cal. 2002); Zearley v. Ackerman, 116 F. Supp. 2d 109 (D.D.C. 2000); L.C. v. Utah State Bd. of Educ., 57 F. Supp. 2d 1214 (D. Utah 1999). The Supreme Court's decision in *Gonzaga University v. Doe*, 536 U.S. 273 (2001) would seem to at least modestly strengthen the majority view. *See, e.g.*, Ralph Mawdsley, *A Section 1983 Cause of Action under IDEA?* 170 EDUC. L. REP. (West) 425 (2002).

67. *See, e.g.*, Rebecca Bouchard, *The Relationship Between the Individuals with Disabilities Education Act and Section 1983: Are Compensatory Damages an Available and Appropriate Remedy?* 25 W. NEW ENG. L. REV. 301 (2003); Terry Jean Seligman, *A Diller, A Dollar: Section 1983 Damage Claims in Special Education Lawsuits*, 36 GA. L. REV. 465 (2001).

68. 67 F.3d at 495. Moreover, in a recent unpublished opinion that rejected such liability in the absence of clearly identified and quantifiable injury, the Third Circuit characterized *Matula* as only allowing money damages "in certain § 1983-based IDEA claims." C.M. v. Bd. of Educ. of Union County Reg'l High Sch. Dist., 128 Fed. Appx. 876, 880 (3d Cir. 2005).

69. 67 F.3d at 497-98. For the significant differences, *see, e.g.*, Perry Zirkel, *A Comparison of the Individuals with Disabilities Education Act and Section 504/ADA*, 178 WEST'S EDUC. L. REP. 629 (2003).

70. *See supra* note 10 and accompanying text.

of the IDEA did not provide any further clarification until the 1997 and 2004 amendments.

A. IDEA 1997

In the 1997 amendments to the IDEA, Congress codified the *Burlington-Carter* framework, adding certain refinements to this case law.[71] The refinements included the express confirmation of various boundaries of equitable remedies. One of these clarifications was that unreasonable parental actions may cause the reduction or elimination of an otherwise warranted tuition reimbursement award (i.e., one that fulfilled steps one and two).[72] This refinement serves, as aforementioned,[73] as a correction of the Third Circuit's view of unreasonable parental conduct. Another provision added to reinforce and structure the equitable nature this relief was the requirement that parents provide timely written notice of the intended unilateral placement and the reasons for their rejection of the district's proposed IEP.[74] This provision appears to endorse the *Bernardsville* approach,[75] but attaches it to an earlier stage than the filing for due process.[76] This provision also

71. 20 U.S.C. §1412(a)(10)(C) (2003); *see also* 34 C.F.R. § 403(c)-(e) (2004). The commentary to the regulations seem to suggest that, in the Department of Education's view, hearing/review officers and courts' authority under *Burlington-Carter* extends beyond the specific boundaries of the Amendments. 64 Fed. Register 12,602 (Mar. 12, 1999). Indirectly addressing this question, the federal appellate courts have disagreed as to whether the express statutory prerequisite about the child's previous receipt of special education is absolute. *Compare* M.M. *ex rel.* C.M. Sch. Bd. of Miami-Dade County, 437 F.3d 1085 (11th Cir. 2006), *with* Greenland Sch. Dist. v. Amy N., 358 F.3d 150 (1st Cir. 2004).

72. 20 U.S.C. § 1412(a)(10)(C)(iii) (2003); *see also* 34 C.F.R. § 403(d) (2004).

73. *See supra* note 58 and accompanying text.

74. *Id.* Specifically, the amendment authorizes reduction or denial of reimbursement if the parent fails to provide notice at the most recent IEP meeting, or in writing ten business days prior to the removal, that "they were rejecting the [district's proposed] placement . . ., including stating their concerns and their intent to enroll their child in a private school at public expense." *Id.* Although the effect is discretionary rather than mandatory, most of the courts have adopted a strict, denial approach. *See, e.g.*, Ms. M. v. Portland Sch. Comm., 360 F.3d 267 (1st Cir. 2004); Berger v. Medina City Sch. Dist., 348 F.3d 523 (6th Cir. 2003); Rafferty v. Cranston Pub. Sch. Comm., 315 F.3d 21 (1st Cir. 2002); Tracy v. Beaufort County Sch. Dist., 335 F. Supp. 2d 675 (D.S.C. 2004); Schoenbach v. Dist. of Columbia, 309 F. Supp. 2d 71 (D.D.C. 2004).

75. Various court and hearing/review officer decisions in cases arising before the 1997 Amendments provided additional, albeit indirect and interim, validation of the *Bernardsville* timely-notice factor for tuition reimbursement. *See, e.g.*, L.K. *ex rel.* J.H. v. Bd. of Educ., 113 F. Supp. 2d 856 (W.D.N.C. 2000); Phillips v. Bd. of Educ., 25 IDELR 500 (S.D.N.Y. 1997); Bd. of Educ. of New York City, 29 IDELR 143 (N.Y. SEA 1998); Bd. of Educ. of New York City, 23 IDELR 280 (N.Y. SEA 1995); *cf.* Brillon Sch. Dist., 25 IDELR 842 (Wis. 1996) (multi-factor approach).

76. It also appears to adopt the zero-period, rather than one-year interpretation of *Bernardsville*. *See supra* note 56 and accompanying text. Moreover, the amendment

appears, in the selection of its deadline and contents,[77] to be rooted in the reasoning of the *M.C.* reasonable rectification factor for compensatory education.[78]

B. IDEA 2004

In addition to the Congressional actions and case law discussed above,[79] the most recent reauthorization of the IDEA further shows that the Third Circuit is out-of-step with the intent of the IDEA. Specifically, although the revisions of tuition reimbursement made only minor refinements,[80] the amendments explicitly provide, for the first time, a statute of limitations for stages one (i.e., due process hearing)[81] and two (judicial review).[82] For stage one, which is the relevant limitations period here, the Act now specifically requires the parent's filing for a due process hearing "within 2 years of the date the parent or public agency knew or should have known about the alleged action that forms the basis of the complaint, or, if the State has an explicit time limitation for requesting such a hearing . . . in such time as the state law allows."[83] The amendments also specify an equitable exception to this limitations period where the district prevented the parent from requesting the hearing "due to specific misrepresentations . . . that [the district] had resolved the problem forming the basis of the complaint, or . . . withholding of

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expressly provides accompanying mitigating circumstances, such as failure of the district to inform the parent of this notice requirement. 20 U.S.C. § 1412(a)(10)(C)(iv) (2003); *see also* 34 C.F.R. § 403(e) (2004).

77. *See supra* note 74.

78. *See supra* note 47 and accompanying text.

79. *See supra* text accompanying notes 35, 53, 59-67, and 72-73.

80. Specifically, Congress divided the mitigating circumstances exceptions into two categories—the first that precluded reducing or denying tuition reimbursement for certain circumstances, such as the district preventing the parent from providing timely notice, and the second that permitted reducing or denying tuition reimbursement in other circumstances, such as the parent being illiterate and unable to write in English. Individuals with Disabilities Education Improvement Act of 2004, 20 U.S.C.A. § 1412(a)(10)(C)(iv) (2005).

81. *Id.* § 1415(i)(2)(B) (ninety days or period specified in state law).

82. *Id.* § 1415(f)(3)(C); *see also* 20 U.S.C.A. § 1415(b)(6)(B).

83. *Id.* § 1415(f)(3)(C). This provision also triggers the date in terms of when the district had actual or constructive knowledge, but that alternative, which is second in the parallel construction for the parent or the district filing for the hearing, presumably applies in the relatively rare, and here, irrelevant occasions when the district files for a hearing. The legislative history clarifies that the broader alternative is for a state-specified exception "through either statute or regulation . . . [but] not . . . [via] common law determinations." S. Rep. 108-185, at 40 (2003). Said legislative history also confirms the analogy to the point of integration: "This new provision is not intended to alter the principle under IDEA that children may receive compensatory education services, as affirmed in . . . *Burlington* . . . and . . . *Carter* . . . and otherwise limited under [the tuition reimbursement section of the IDEA]." *Id.*

information from the parent that was required . . . to be provided to the parent."[84] Finally, at least indirectly recognizing equitable factors relating to parental conduct, the amendments prescribe FAPE-forfeiting consequences for the parents' failure to provide consent for initial special education services.[85]

This new language concerning the limitations period, by applying across the board, would seem to counter the Third Circuit's distinction between compensatory education and tuition reimbursement. Moreover, the exceptions, which overlap with the equitable specifications for tuition reimbursement,[86] tend to support the interweaving of these remedies. Furthermore, although not mentioning the remedy of compensatory education, Congress was presumably aware of this increasingly prevalent remedy under the IDEA, and the specified two-year stage one limitations period rejects the *M.C.-Ridgewood* open-ended approach.[87] The additional new language reinforcing the role of parents, with FAPE-forfeiting consequences for non-cooperating conduct, provides added recognition of balancing the equities in FAPE matters, inferably including remedies.

IV. Confusion and Resolution

The Third Circuit's cursory and unconvincing distinction between tuition reimbursement and compensatory education has caused confusion for the lower courts[88] and hearing/review officers[89] within its jurisdiction,

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84. 20 U.S.C.A. § 1415(f)(3)(D). Again, the required information presents a possible ambiguity. Presumably, said information refers to district-required notification prior to filing, specifically the procedural safeguards notice. Arguably, however, it also includes other pre-filing district-required notifications, such as IEP progress reports.

85. 20 U.S.C.A. § 1414(a)(1)(D)(ii)(III); *see also* 20 U.S.C.A. § 1415(k)(5)(C).

86. *See supra* note 74.

87. Alternatively, the amendments clarify that the Third Circuit's accrual analysis, as that of other jurisdictions, is merely to determine when the period begins to run, but not to demarcate its limiting duration. *See, e.g.*, James v. Upper Arlington City Sch. Dist., 228 F.3d 764 (6th Cir. 2000); Providence Sch. Dep't v. Ana C., 108 F.3d 1 (1st Cir. 1997); Dreher v. Amphitheater Unified Sch. Dist., 22 F.3d 228 (9th Cir. 1994); Dell v. Bd. of Educ., 32 F.3d 1053 (7th Cir. 1994).

88. The prime example concerns the limitations period for compensatory education. *Compare, e.g.*, Amanda v. Coatesville Area Sch. Dist., 42 IDELR ¶ 260 (E.D. Pa. 2005); Kristi H. v. Tri-Valley Sch. Dist., 107 F. Supp. 2d 628 (M.D. Pa. 2000), *with* David P. v. Lower Merion Sch. Dist., 29 IDELR 23 (E.D. Pa. 1998); Montour Sch. Dist. v. S.T., 805 A.2d 29 (Pa. Commw. Ct. 2003). For a more extensive identification and analysis, including its effects on the Pennsylvania appeals panel, *see* Zirkel, *supra* note 19.

89. For example, in addition to the limitations period for compensatory education (*id.*), the Pennsylvania appeals panel, which is the state's review officer tier under the IDEA, is split with regard to whether the equities, more specifically the good or bad faith of the parties' conduct, apply in compensatory education cases. *Compare* Cumberland Valley Sch. Dist., 42 IDELR ¶ 79 (Pa. SEA 2004), Pottstown Sch. Dist., 29 IDELR 113 (Pa. SEA 1998), *with* Pennsbury Sch. Dist., 40 IDELR ¶ 246 (Pa. SEA 2003); Se. Delco

and has sown seeds of similar mischief in other jurisdictions.[90] For example, in a New Jersey federal district court decision, which the Third Circuit summarily affirmed without opinion, the lower court applied, with "difficulty," the *M.C.* edict that excluded "vigilance of the parents (who may not be sufficiently sophisticated to comprehend the problem)" as a relevant factor for triggering the period for compensatory education.[91] In this case, specialized counsel represented the parents during the formulation of the IEP and did not raise objections to its procedural elements until after the start of the due process hearing, whereupon the defendant district promptly and diligently corrected the alleged deficiencies via the IEP team process.[92] As a result, the court declined to award compensatory education by equitably stretching the Third Circuit's alternative standards for accrual[93] and reasonable rectification[94] and, thus, *de facto* considering the good faith, or vigilance, of both parties.

The basic problem with the Third Circuit's rather ad hoc framework appears to be the failure to apprehend and apply on a systematic basis the analogy between tuition reimbursement, which has been subject to Congressional codification, and compensatory education, which neither Congress nor the Supreme Court has yet to address.[95] Indeed, the only reference to compensatory education in the legislative history of the most

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Sch. Dist., 34 IDELR ¶ 108 (Pa. SEA 2001).

90. *See, e.g.*, G. v. Fort Bragg Dependent Sch., 343 F.3d 295, 308-09 (4th Cir. 2003) (citing *Ridgewood* for rejection of equitable limitations—here lack of parental notice—in compensatory education calculus); Maine Sch. Admin. Dist. No. 35 v. R., 321 F.3d 9, 18 (1st Cir. 2003) (citing *M.C.* accrual analysis for broader proposition); Diatta v. Dist. of Columbia, 319 F. Supp. 2d 57, 64 (D.C. Cir. 2004) (citing *Ridgewood* accrual analysis in lieu of the court's previously adopted limitations period); *cf.* Bd. of Educ. of Oak Park & River Forest High Sch. Dist. No. 200 v. Illinois State Bd. of Educ., 21 F. Supp. 2d 862, 880 (N.D. Ill. 1998), *vacated on other grounds*, 207 F.3d 931 (7th Cir. 2000) (citing *M.C.* for rejection of compensatory education during entitlement ages).

91. *See supra* note 48 and accompanying text.

92. D.B. v. Ocean Twp. Bd. of Educ., 985 F. Supp. 457, 537 (D.N.J. 1997), *aff'd mem.*, 159 F.3d 1350 (3d Cir. 1998).

93. *Id.* "We see no reason to find that the district should have known of any such deficiencies in her IEP prior to that time, based upon the record in this case." *Id.*

94. *Id.* "Further, we find that the district responded in a timely manner to correct the situation once they became aware of it." *Id.*

95. Moreover, the Third Circuit has not even been internally consistent with regard to the subset or corollary of tuition reimbursement, which is reimbursement for an independent educational evaluation (IEE). In *Holmes v. Millcreek Township School District*, 205 F.3d 583, 591 (3d Cir. 2000), the court cited *Bernardsville* by analogy to point out that the primary criterion is whether the district's evaluation was appropriate. However, in *Warren G. v. Cumberland County School District*, 190 F.3d 80, 87 (3d Cir. 1998), the court roundly rejected any equitable consideration of the parents' failure to object to the district's evaluation, although such consideration is warranted by the *Bernardsville* analogy and is specified in the relevant IDEA regulation. 34 C.F.R. § 300.502(b)(1).

recent amendments to the IDEA premises the availability of this remedy on the Supreme Court's *Burlington-Carter* tuition reimbursement decisions.[96] The core commonalities of tuition reimbursement and compensatory education are established beyond dispute. First, both are equitable remedies in the form of specialized injunctions under the IDEA's broad grant for appropriate relief.[97] Second, both are premised on a denial of the eligible child's entitlement to FAPE, which is the central feature of the Act.[98] The limited difference lies in the parent's election of remedies when faced with the perceived denial of FAPE. In the case of tuition reimbursement, the parent elects the financial risk of a unilateral private placement.[99] In the case of compensatory education, the parent foregoes this risk, choosing to await the outcome of the Act's "ponderous" review process[100] to determine whether the district has denied the child FAPE.[101] Thus, compensatory education avoids the second step of the tuition reimbursement analysis, which is whether the parent's unilateral placement is appropriate.[102]

This seemingly significant difference merits important clarifications. First, as explained more fully elsewhere,[103] and generally apprehended by the Third Circuit,[104] a parent has extraordinary

96. *See supra* note 83. Moreover, as this report further made clear, the limitations period applies to each of these two interrelated remedies equally. S. Rep. No. 108-185, at 40. In contrast, conspicuously absent is any reference to the remedy of money damages.

97. *See supra* notes 23, 29, 31-33 and accompanying text.

98. *See supra* notes 22, 25, 31 and accompanying text.

99. *See supra* notes 26-27 and accompanying text.

100. *See supra* note 25 and accompanying text.

101. *See supra* note 33 and accompanying text.

102. This second step was the focus of *Carter*. *See supra* notes 28-30 and accompanying text.

103. Lynn Daggett et al., *For Whom the School Bell Tolls But Not the Statute of Limitations: Minors and the Individuals with Disabilities Education Act*, 38 U. MICH. L. REFORM 717 (2005). The Supreme Court has recognized the distinctive role of parents under the IDEA. *See, e.g.*, Honig v. Doe, 484 U.S. 305, 311-12 (1988) ("[T]he Act establishes various procedural safeguards that guarantee parents both an opportunity for meaningful input into all decisions affecting their child's education and the right to seek review of any decisions they think inappropriate."); Bd. of Educ. v. Rowley, 458 U.S. 176, 205 (1982) (Congress gave parents "a large measure of participation at every stage of the administrative process.").

104. Collinsgru v. Palmyra Bd. of Educ., 161 F.3d 225, 235-36 (3d Cir. 1998). Subsequent federal district court decisions in the Third Circuit follow, rather than distinguish, the *Collinsgru* conclusion. For example, in a case for money damages and injunctive relief, the district court cited *Collinsgru* in ruling that "[the parent] may not bring suit on his own behalf under IDEA because . . . he does not have substantive rights under that Act." Carpenter v. Pennell Sch. Dist. Elementary Unit, 37 IDELR ¶ 157 (E.D. Pa. 2002). In a later case, the same court upheld a compensatory education award for the child but rejected a parent's right to proceed with her purportedly own substantive reimbursement claim under the IDEA. Dombrowski v. Wissahickon Sch. Dist., 40 IDELR ¶ 39 (E.D. Pa. 2003).

procedural rights under the IDEA on behalf of the child, but the substantive rights, including FAPE and the resultant remedies for its denial, belong to the child, not the parents. That the parent receives the tuition reimbursement, whereas the child receives the compensatory education, is a difference without a distinction, resulting merely from parental election on behalf of the child at the second step.[105] In either event, the child is the "rightful" beneficiary.

Second, the absence of step two in the analytical test for compensatory education makes this remedy substantively easier, and yet potentially more difficult procedurally, to obtain than tuition reimbursement. It is easier substantively because there is no hurdle, whether the burden of proof is on the parent or the district,[106] of proving the appropriateness of an alternative plan the parent has elected over the challenged district's program. It is potentially more difficult procedurally if the preliminary procedural step of timely notice[107] is imported from tuition reimbursement to compensatory education claims. The reason for notification in tuition reimbursement cases is that the parent has taken high-stakes[108] unilateral action[109] warranting clear notice

105. Moreover, under the majority view within the Pennsylvania appeals panel, the parent controls the choice of the place, time, and provider of compensatory education, thus further reducing this superficial difference. *See, e.g.*, Pennsbury Sch. Dist., 40 IDELR ¶ 246 (Pa. SEA 2003); Warren County Sch. Dist., 39 IDELR ¶ 284 (Pa. SEA 2003); Neshaminy Sch. Dist., 37 IDELR ¶ 116 (Pa. SEA 2002); Canon-McMillan Sch. Dist., 36 IDELR ¶ 251 (Pa. SEA 2002); Whitehall-Coplay Sch. Dist., 34 IDELR ¶ 254 (Pa. SEA 2001); Northern Lebanon Sch. Dist., 34 IDELR ¶ 215 (Pa. SEA 2001); Philadelphia Sch. Dist., 33 IDELR ¶ 259 (Pa. SEA 2000). The majority view elsewhere is that the IEP team makes these choices, which still provides a key, but partnering role to the parent in determining the compensatory education. Zirkel, *supra* note 16, at 755-56.

106. An earlier commentary mistakenly characterized the burden of proof as being on the parents at step one. Jean Bond, *Making Up for Lost Time: The Third Circuit's Use of Remedies for Violations of the Individuals with Disabilities Education Act*, 46 VILL. L. REV. 777, 793 (2001). Rather, the Third Circuit generally puts the burden of persuasion on the district, including the first step of tuition reimbursement analysis, but it has carved out an exception at the second step, putting the burden on the parent to prove the appropriateness of the unilateral placement. Carlisle Area Sch. Dist. v. Scott P., 62 F.3d 520, 533 (3d Cir. 1995). This framework is appropriate. *See* Thomas Mayes et al., *The Burden of Proof under the Individuals with Disabilities Education Act*, 108 W. VA. L. REV. 27 (2005). However, the Supreme Court's recent ruling that the burden of proof in a FAPE case at the due process hearing level directly affects this first step and may indirectly affect this second-step allocation. Schaffer v. Weast, 126 S. Ct. 528 (2005).

107. *See supra* note 74 and accompanying text.

108. Although precise figures specific to tuition reimbursement are not available, the average cost for special education students placed in nonpublic schools is twice that for special education students generally. *See* Chambers et al., *supra* note 1, at Appendix B1. Moreover, the average cost for residential placement is more on the order of five times the general per pupil cost for special education. Mayes & Zirkel, *supra* note 15, at 350.

109. For a rationale based specifically on the distinction of unilateral parental action, thus creating a limited but cogent exception for the limited situation where the parent seeks compensatory education after disenrolling the child, *see* Minneapolis Pub. Sch., 32

to the district of its last-chance opportunity to have the IEP team to resolve the matter,[110] thus avoiding the mutual risk of undue costs.[111] This risk is less acute for compensatory education because tuition reimbursement relief tends to be all-or-nothing[112]—and even in the relatively few partial awards the reduction is typically in units of years[113]—whereas compensatory education is amenable to a much more tailored approach based on days or hours.[114]

The absence of step two warrants careful customization of the analogy from tuition reimbursement to compensatory education within the IDEA framework, which includes 1) FAPE as the primary purpose, 2) a broad grant of equitable remedial authority, 3) a pervasive partnership between parents and districts via the IEP process, along with the attendant procedural safeguards, and 4) codification of the *Burlington-Carter* approach to tuition reimbursement. Specifically, the recommended approach to compulsory education consists of various elements based on the systematic application of the tuition reimbursement analogy, which requires revision, but not reversal, of the Third Circuit's leading position. These recommendations for compensatory education have secondary implications for the remedy of money damages.

A. Compensatory Education

First, the Third Circuit is correct that the substantive trigger for

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IDLER ¶ 83 (Minn. SEA 1999) (citing Moubry v. Indep. Sch. Dist. No. 696, 27 IDELR 469 (D. Minn. 1997) and Brantley v. Indep. Sch. Dist. No. 625, 26 IDELR 839 (D. Minn. 1997)).

110. The unilateral action of disenrollment does not provide such unambiguous notice because parents may do so for various reasons unrelated to tuition reimbursement, such as home schooling, change in residency, or enrollment in a private school—as the IDEA recognizes (20 U.S.C. § 1412(a)(10)(A))—purely as a matter of choice.

111. *See supra* text accompanying notes 38-40 and 74-76.

112. For all published, conclusive decisions from September 1978 to August 2000, the overwhelming majority (86%) was either completely in favor of the district (54%) or the parent (32%). Mayes & Zirkel, *supra* note 15, at 355. For the period between the 1997 IDEA Amendments and August 2000, the corresponding figures were not significantly different—85% completely in favor of either the district (56%) or the parent (29%). *Id.* at 356.

113. For a rare exception where the court awarded half a year, *see* Kitchelt v. Weast, 341 F. Supp. 2d 553 (D. Md. 2004). Similarly, instances of published decisions that used excess costs (*see supra* text accompanying note 30) as a basis for reductions within the units of a year are relatively rare. *See, e.g.*, River Forest Sch. Dist. No. 90 v. Illinois State Bd. of Educ., 24 IDELR 36 (N.D. Ill. 1996); *cf.* Knable v. Bexley City Sch. Dist., 238 F.3d 755 (6th Cir. 2001) (consideration upon remand).

114. *See, e.g.*, Perry Zirkel, *Compensatory Educational Services in Special Education Cases: An Update,* 150 EDUC. L. REP. (West) 311, 324-25 (2001).

compensatory education is denial of FAPE[115] beyond a de minimis level, without a requirement of gross or bad faith deprivation. Neither the IDEA in its original form, nor its 1997 amendments that incorporated the intervening *Burlington-Carter* interpretation, provide any support for the competing, Second Circuit view that the denial must be gross.[116] Similarly, bad faith on the district's part, as on the parent's part, is part of the balancing of the equities, not an essential element of the denial of FAPE.

Second, in light of the absence of step two, timely notice should not be a separable element for compensatory education;[117] instead, it should play a role only within the overall balancing of the equities in terms of each side's behavior.[118] The Third Circuit was partially correct in discounting this element, but it went too far by entirely relying on an unwarranted assumption about the knowledgeability of the parents.[119] Moreover, its repeated references to vigilance of the parents were limited to the limitations period, not the calculation factors, for compensatory education.[120] On the other side, the remainder of the Third Circuit's analysis, mainly the deduction in the calculus for a reasonable rectification period, is consistent with the notification element of tuition reimbursement.[121]

Third, an analysis of the equities fully applies to compensatory education.[122] The absence of step two reinforces, rather than eliminates,

115. The Third Circuit is also quite correct in its "snapshot" approach for determining whether the district met its FAPE obligation. Fuhrmann v. E. Hanover Bd. of Educ., 993 F.3d 1031 (3d Cir. 1993). Moreover, contrary to an earlier commentary's characterization (Bond, *supra* note 105, at 789, 795), the Third Circuit puts the burden of persuasion on the district regarding the FAPE-denial issue, although the Supreme Court has reversed this view. *See supra* note 105.

116. *See, e.g.*, Garro v. State of Connecticut, 23 F.3d 734, 737 (2d Cir. 1994). Alternatively, it may be that the Second Circuit's approach, at its roots, does not require such a standard, instead being merely a confirmation of the general understanding that procedural violations must be prejudicial, not merely technical or harmless error, and that, indeed, complete denials of FAPE—as in *Lester H.*—clearly warrant compensatory education. *See, e.g.*, Mrs. C. v. Wheaton, 916 F.2d 69, 75 (2d Cir. 1990); Burr v. Ambach, 863 F.2d 1071, 1075 (2d Cir. 1988) (*Burr I*).

117. For the relatively limited exception, *see supra* note 109.

118. For the rationale, *see supra* text accompanying notes 106-14.

119. *See supra* text accompanying notes 48 and 92-94.

120. *See supra* notes 48, 51, 91 and accompanying text.

121. *See supra* text accompanying note 40. For recognition of this connection, *see* Jim Thorpe Area Sch. Dist., 29 IDELR 320, 323 n.50 (Pa. SEA 1998).

122. As a threshold general matter, the courts agree that compensatory education, like tuition reimbursement, is an equitable matter. *See, e.g.*, Student W. v. Puyallup Sch. Dist. No. 3, 31 F.3d 1489 (9th Cir. 1994); Bean v. Conway Sch. Dist., 18 IDELR 65 (D.N.H. 1991). After all, both are merely specialized, FAPE-based forms of injunction. *See* Zirkel, *supra* note 17.

the role of equity.[123] As a threshold matter, the 2004 IDEA amendments have corrected the Third Circuit's confusing and open-ended accrual analysis by specifying a fixed statute of limitations period that applies cross the board, thus including compensatory education as well as tuition reimbursement.[124] Next, given the special role of parents under the IDEA generally,[125] and the inclusion of unreasonable parental conduct in the codification of *Burlington-Carter* analysis specifically,[126] the good or bad faith of parents merits equitable balancing against the behavior of the district in the calculation of compensatory education.[127] The balancing of the equities, which the Third Circuit rightly recognized as "unavoidable" for tuition reimbursement under the broad framework of the IDEA,[128] is all the more unavoidable for compensatory education in light of the Act's core emphasis on fostering cooperation between parents and schools.[129] This balancing should take into consideration such factors as whether the parents were represented by legal counsel or otherwise knowledgeable about the rights under the IDEA, whether the parents were passive or obstructive in the various mandated responsibilities for participation on behalf of the child's FAPE, and whether the district was responsive or deceptive in terms of its statutory obligations, especially in facilitating the mandate for meaningful parental

123. *See supra* notes 106-14 and accompanying text.

124. *See supra* text note 83 and accompanying text. This new language also separates and corrects accrual analysis, fixing the point as when the district *or the parent* knew or should have known of the FAPE violation. *Id.* The legislative history reinforces the application of the limitations period to each of these two remedies specifically. *See supra* note 96. Incidentally, tolling should not apply to either compensatory education or tuition reimbursement, which would judicially undo this new legislative provision. *See generally* Daggett et al., *supra* note 103.

125. *See supra* notes 103-04 and accompanying text.

126. *See supra* notes 72 and accompanying text.

127. For decisions that have recognized the applicability of the equities in the calculation of compensatory education, *see* Reid v. Dist. of Columbia, 401 F.3d 516 (D.C. Cir. 2005); Student W. v. Puyallup Sch. Dist. No. 3, 31 F.3d 1489 (9th Cir. 1994); Moubry v. Indep. Sch. Dist. No. 696, 27 IDELR 469 (D. Minn. 1997); *cf.* Bd. of Educ. of Christina Sch. Dist. v. RF, 40 IDELR ¶ 38 (Del. Fam. Ct. 2003) (lack of notice).

128. *See supra* note 40. As aforementioned (*supra* text accompanying note 73), Congress effectively corrected the Third Circuit's subsequent brief deviation in *Warren G.*

129. In its landmark FAPE case under the IDEA, the Supreme Court concluded that fostering cooperation between parents and schools was a primary purpose of the Act. Bd. of Educ. v. Rowley, 458 U.S. 176, 207 (1982). The subsequent lower court FAPE decisions have repeated this central theme. *See, e.g.*, Mr. and Mrs. D. v. Southington Bd. of Educ., 119 F. Supp. 2d 105, 113 (D. Conn. 2000); W.L.G. v. Riley, 975 F. Supp. 1317, 1329 (M.D. Ala. 1997); Leake v. Berkley County Bd. of Educ., 965 F. Supp. 838, 846 (N.D. W. Va. 1997). In its more recent decision under the IDEA, the Supreme Court further reinforced the importance of parent-school cooperation by characterizing it as "the core of [the IDEA]." Schaffer v. Weast, 126 S. Ct. 528, 533 (2005).

participation.[130]

Fourth, compensatory education need not—indeed should not—wait for the child to reach the statutory ceiling of age 21 before implementation of relief. The Third Circuit's dictum to the contrary in *Lester H.*[131] runs counter to the child's overriding need for prompt FAPE.[132] This language would be better understood as clarifying that where the child's age is beyond the statutory ceiling, the claim for compensatory education is not moot if based on a denial of FAPE during the entitlement period.[133] Similarly correcting another *Lester H.* dictum, it is now clear than hearing/review officers have remedial authority to grant not only tuition reimbursement, but also compensatory education.[134]

The Third Circuit has not yet addressed, but should take the lead in, other issues integral to the remedy of compensatory education. For example, once a hearing/review officer or court awards a specified amount of compensatory education, who should be responsible for determining its specific implementation, including what is delivered, who delivers its, and when and where it is delivered? The Pennsylvania appeals panel has addressed this issue, and its decisions have resulted in

130. In the most recent IDEA amendments, Congress added further emphasis on "the parents' opportunity to participate in the decision making process regarding the provision of [FAPE]." *See supra* note 12.

131. *See supra* note 34; *cf.* John T. v. Delaware County Intermediate Unit, 32 IDELR ¶ 142 (E.D. Pa. 2000) ("compensatory education after age 21 would not satisfactorily remedy denial of special services to [the student] during his crucial early educational years").

132. *See, e.g.*, Spiegler v. Dist. of Columbia, 866 F.2d 461, 467 (D.C. Cir. 1989) (quoting the principal Congressional author of what is now the IDEA, emphasizing that "delay in resolving matters regarding the education program of a handicapped child is extremely detrimental to his development.").

133. Another area of confusion, albeit not specific to the Third Circuit, is awarding compensatory education during the school day in such a way as to merge with the obligation to provide FAPE prospectively, thus effectively nullifying its compensatory additive effect. *See, e.g.*, Reese v. Bd. of Educ. of Bismarck R-V Sch. Dist., 225 F. Supp. 2d 1149 (E.D. Mo. 2002). Compensatory education, like tuition reimbursement, is retrospective in its calculation. However, tuition reimbursement is implemented in a lump sum payment, whereas the implementation of compensatory education is, by necessity, more obviously prospective, warranting care to keep it separate from the district's ongoing FAPE obligation. *See, e.g.*, Manchester Sch. Dist. v. Christopher B., 807 F. Supp. 860, 869 (D.N.H. 1992) ("an award which requires a [district] to provide a student education services during a period of time in which it is already obligated to provide that student a free appropriate education does not constitute an award of compensatory education under the Act.").

134. *See supra* note 35 and accompanying text. However, these remedies are separate, not simultaneous; they should not be awarded for the same denial of FAPE. *See, e.g.*, Kenston Local Sch. Dist., 41 IDELR ¶ 47 (Ohio SEA 2003); Upper Perkiomen Sch. Dist., 40 IDELR ¶ 115 (Pa. SEA 2003); North Penn Sch. Dist., 40 IDELR ¶ 109 (Pa. SEA 2003).

two competing answers. One view is that the parents should have the discretion to decide these implementation issues based on the rationale that 1) the district defaulted on its FAPE obligation, and 2) the IDEA grants parents sole authority in other important areas, such as selecting independent educational evaluations (IEEs), their attorneys, and the unilateral placements that lead to step two of tuition reimbursement analysis.[135] The other, and preferable, view is that the IEP team, representing the core collaborative[136] vehicle for FAPE,[137] should shoulder the responsibility for such implementation issues.[138] The reasons for this view are that 1) the district's default should revert to the mandated IEP process that is central to the Act and that sets the tone for the continuing relationship of the parties in terms of the child's

135. *See, e.g.*, Canon-McMillan Sch. Dist., 36 IDELR ¶ 251 (Pa. SEA 2002). The alternate rationale is based on the analogy to tuition reimbursement, which runs counter to the related and false dichotomy between student and parent remedies. *See, e.g.*, Northern Lebanon Sch. Dist., 34 IDELR ¶ 215 (Pa. SEA 2001). In any event, under this view the only limitation is cost based on salaries and fringe benefits the district would have expended to provide these services. *See, e.g.*, Warren County Sch. Dist., 39 IDELR ¶ 284 (Pa. SEA 2003). The problem is that if the district disputes the costs, it will have to re-invoke the due process hearing procedure of the Act, thus entailing more adversariness and transaction costs.

136. *See supra* note 129.

137. *See, e.g.*, Honig v. Doe, 484 U.S. 305, 311-12 (1988):

> Envisioning the IEP as the centerpiece of the statute's education delivery system for disabled children, and aware that schools had all too often denied such children appropriate educations without in any way consulting their parents, Congress repeatedly emphasized throughout the Act the importance and indeed the necessity of parental participation in both the development of the IEP and any subsequent assessments of its effectiveness. . . . Accordingly, the Act establishes various procedural safeguards that guarantee parents both an opportunity for meaningful input into all decisions affecting their child's education and the right to seek review of any decisions they think inappropriate.

Id.

138. *See, e.g.*, Lower Merion Sch. Dist., 33 IDELR ¶ 139 (Pa. SEA 2000). In other jurisdictions, there is much more support for this approach than for the parent view. *See, e.g.*, Simms v. Dist. of Columbia, 44 IDELR ¶ 41 (D.D.C. 2005); Blackman v. Dist. of Columbia, 374 F. Supp. 2d 168 (D.D.C. 2005); Blackman v. Dist. of Columbia, 277 F. Supp. 2d 1 (D.D.C. 2003); Melvin v. Town of Bolton Sch. Dist., 20 IDELR 1189 (D. Vt. 1993), *aff'd mem.*, 100 F.3d 944 (2d Cir. 1996); State of Connecticut Unified Dist. No. 1 v. State Dep't of Educ., 699 A.2d 1077 (Conn. Super. Ct. 1997); Los Angeles Unified Sch. Dist., 37 IDELR ¶ 293 (Cal. SEA 2002); Tehachapi Unified Sch. Dist., 37 IDELR ¶ 51 (Cal. SEA 2002); San Juan Unified Sch. Dist., 36 IDELR ¶ 198 (Cal. SEA 2002); Hacienda La Puente Unified Sch. Dist., 30 IDELR 105 (Cal. SEA 1999); Christina Sch. Dist., 43 IDELR ¶ 233 (Del. SEA 2005); Forrestville Valley Cmty. Unit Sch. Dist., 37 IDELR ¶ 209 (Ill. SEA 2002); Pemberton Twp. Bd. of Educ., 35 IDELR ¶ 24 (N.J. SEA 2001); Northside Indep. Sch. Dist., 41 IDELR ¶ 250 (Tex. SEA 2004); Garland Indep. Sch. Dist., 38 IDELR ¶ 79 (Tex. SEA 2002); Alief Indep. Sch. Dist., 36 IDELR ¶ 252 (Tex. SEA 2002). *But cf.* Reid v. Dist. of Columbia, 401 F.3d 516, 526 (D.C. Cir. 2005) (hearing officer may not delegate to the IEP team authority to reduce or discontinue the award due to prohibition of hearing officer being a district employee).

entitlement to FAPE; 2) in contrast to compensatory education, parents unrestricted selection of IEEs and attorneys are at their own expense and risk, with districts only responsible for subsequent payment upon limited conditions; and 3) tuition reimbursement, which is the most applicable analogy, required—in addition to denial of FAPE and the balancing of the equities—the added condition that the parent's choice was appropriate. Giving parents the unrestricted discretion to choose the what, when, and where of compensatory education—particularly when the child's needs and IEP have likely changed—with the only risk being further litigation to challenge their choice, is neither fitting nor prudent.

A final example is perhaps the most difficult issue of all—whether compensatory education should merely be a mechanical, hour-for-hour formula[139] or, as the D.C. Circuit recently ruled, a flexible, qualitative approach.[140] Citing the *Burlington* and *Carter* decisions' reference to "equitable considerations," the D.C. circuit ruled that "the ultimate award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place."[141] Although appealing in terms of the *Rowley* substantive standard for FAPE, this standard may prove unworkable due to the passage of time resulting from the Act's "ponderous" dispute resolution process, including problems such as 1) the child's changed needs from the time of the disputed IEP to the issuance of the award, 2) the overlapping standard for the child's new IEP, and 3) the ultimately "soft" state of the art with regard to what is reasonably calculated to provide educational benefit.[142] The broad definition of "specially designed instruction," which is the heart of FAPE, is "hopelessly ambiguous," leading to "vastly divergent

139. It is at least arguable that the Third Circuit's reference to "a period equal to the period of deprivation" was merely a gross preliminary calculation, awaiting more refined and definitive analysis. M.C. v. Cent. Reg'l Sch. Dist., 81 F.3d 389, 391 (3d Cir. 1996).

140. Reid v. Dist. of Columbia, 401 F.3d 516, 523-24 (D.C. Cir. 2005); *see also* Branham v. Dist. of Columbia, 427 F.3d 7 (D.C. Cir. 2005).

141. *Reid*, 401 F.3d at 524. Acknowledging that the award might in some cases be notably shorter than the hour-by-hour calculation and in other cases even more, the court included equitable consideration of the parties' conduct and the *M.C.* reasonable-rectification adjustment in its analysis. *Id.*

142. For example, an empirical study found a statistically significant difference between the final administrative (i.e., hearing or review officer) decision and the ultimate court decision in a representative sample of published cases under the IDEA. James Newcomer & Perry Zirkel, *An Analysis of Judicial Outcomes of Special Education Cases*, 65 EXCEPTIONAL CHILDREN 469 (1999). In this author's fifteen years of experience as an IDEA review officer and his twenty-five years of experience doing research on special education cases, I have often found that what was appropriate under the *Rowley* standard depended on who was the impartial decision maker in the case; thus, the respective parties—given their skewed perspectives and entrenched positions—often found the outcome to be unpredictable.

interpretations" among decision makers.[143]

B. Money Damages

Given the rather complete role of tuition reimbursement and compensatory education in fulfilling the IDEA's equitable grant of remedial authority,[144] as well as the prevailing view that § 504 and the ADA provide for money damages for intentional discrimination (i.e., gross misjudgment, bad faith, or deliberate indifference)[145] the Third Circuit should reverse its view that § 1983 provides an avenue for money damages under the IDEA.[146]

Conclusion

The Third Circuit has the opportunity to provide plenary leadership, not partial mis-leadership, in tailoring the fabric of the IDEA's equitable grant of "appropriate relief" into a customized, rather than patchwork- or crazy-, quilt. Regardless of whether the Third Circuit fulfills this role, lower courts elsewhere, and ultimately the Supreme Court or Congress, need to sculpt a comprehensive and coherent approach to IDEA remedies that focuses the limited resources under this funding statute[147] for the prompt provision of FAPE to students with disabilities,[148] leaving monetary liability to the alternate claims available under civil rights legislation and common law torts. As the immediate priority, the emerging primary remedy of compensatory education should be carefully tailored to be consistent with, and informed by, the Supreme Court's and Congress's formulation of tuition reimbursement.

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143. Robert A. Garda, *The New IDEA: Shifting Educational Paradigms to Achieve Racial Equality in Special Education*, 56 ALA. L. REV. 1071, 1106 (2005).

144. Of course, declaratory and more general injunctive relief are available to fill the gaps, such as ruling that a district has violated its duties with regard to determining eligibility or proposing placement and prospectively ordering the IEP team to evaluate the child or propose a different placement. *See, e.g.*, Zirkel, *supra* note 17.

145. *See supra* notes 63-64.

146. *See supra* note 96 and text accompanying notes 59-60 and 65-67. The court's favoring of the alternatives of compensatory education or tuition reimbursement was a step in the right direction. *See supra* note 60. Moreover, the court should incorporate this qualifying standard for § 504 and the ADA claims, whether based on § 1983 or not. *See supra* text accompanying notes 61-64; *see also* Allan Osborne, *Remedies for a School District's Failure to Provide Services under the IDEA*, 112 EDUC. L. REP. (West) 1, 20 (1996).

147. *See supra* text accompanying note 1.

148. *See supra* note 130. For the need for prompt dispute resolution more generally under the IDEA, *see* Perry Zirkel, *The Over-Legalization of Special Education*, 195 EDUC. L. REP. (West) 35 (2005); Perry Zirkel, *Over-Due Process Revisions for the Individuals with Disabilities Education Act*, 55 MONT. L. REV. 403 (1994).